Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1407

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION,
Petitioner,

v.

ST. LOUIS COUNTY NATIONAL BANK, CLAYTON TRUST COMPANY, and WILLIAM R. KOSTMAN, Director of the Division of Finance for the State of Missouri,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT

St. Louis County National Bank, in Opposition

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OPINIONS BELOW

The opinion of the District Court (Appendix A of Petition) is reported at 420 F.Supp. 510. The opinion of the Court of Appeals for the Eighth Circuit, and the dissenting opinion (Appendix B of Petition) are reported at 548 F.2d 716.

PRELIMINARY STATEMENT

Pursuant to U.S. Sup. Ct. Rule 40(3), 28 U.S.C.A., Respondent accepts Petitioner's statement of jurisdictional requisites, statutes involved, questions presented for review, and statement of the case.

REASONS FOR DENYING THE WRIT

I

The Court of Appeals in Holding That a Trust Office Where No Deposits Are Received or Checks Paid or Money Lent Is a Branch Under Section 36(f) of the National Bank Act Has Correctly Applied Federal Law in Upholding the Principle of Competitive Equality as Expressed by the Congress and Is Not in Conflict With Any Decision of This Court or the Courts of Appeals.

Petitioner asserts that the divided opinion below which finds a branch to exist under Section 36(f) of the National Bank Act where the activity in question did not involve the receipt of deposits, the payment of checks or the lending of money is "a case of first impression in our courts" (Petition p. 11); that the court below indulged in an "expansive reading of the federal definition of 'branch' " as a result of the majority's "zeal to maintain perfect competitive equality"; and that such a result is "demonstrably wrong and is in conflict with the applicable decisions of this Court" (Petition p. 14).

Petitioner further complains that the court's "undue emphasis on the policy of competitive equality is tantamount to assigning an indispensable role to state law in its decision that the trust office was a branch" (Petition p. 15) and that this court in *First National Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969) settled the question that state law comes into play only in deciding "how, where and when" branches may be operated and that state law has no part to play in the definition of branch. Petitioner further contends "confusion continues" and that it is time for this Court to settle the confusion (Petition p. 18).

On the contrary, the opinion below (Petition, Appendix B, p. A-14) is consistent with the statutory definition of "branch" 12 U.S.C. § 36(f) and the principle of competitive equality and is not in conflict with any decision of this Court or the Courts of Appeals.

James E. Smith, appellant below, as Comptroller of the Currency of the United States, is charged with the responsibility for the execution and regulation of the National Bank Act, 12 U.S.C. §§ 1, et seq., and all other laws relating to national banks. The Comptroller does not believe the questions presented to be sufficiently important to national banks throughout the country or to the proper administration of the National Bank Act to ask this Court to review the decision below. Only Petitioner Mercantile Trust Company, a national bank in competition with Respondents St. Louis County National Bank, also a national banking entity, and Clayton Trust Company, a state bank, seeks a rehearing by petition for Writ of Certiorari.

This court in *First National Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969), stated:

> "The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system." (l.c. 133)

It appears from the decision that in the context of that litigation all parties were in agreement that federal law alone applied to whether the challenged activity fell within the definition of "branch" as stated in 12 U.S.C. § 36(f). See 396 U.S. l.c. 133 footnote 7. Chief Justice Burger speaking for this Court agreed that this "threshold" question was to be determined by Federal law. However, he cautioned that the question must be determined having in mind the congressional intent that so far as branch banking is concerned "the two ideas [unit bank and branch banking] shall compete on equal terms and only where

the States [allow] their own institutions [to] have branches" (l.c. 134).

In *Dickinson*, supra, the plaintiff bank and the Comptroller had urged, as does Petitioner here, a restrictive meaning to the definition of branch banking. In *Dickinson*, it was argued that because of the "carefully drawn" contracts with plaintiff's customers who used the armored car or deposit receptacle services, the challenged activities did not constitute a "branch * * * at which deposits are received, or checks paid, or money lent." The Court rejected this argument saying:

> "* * * In short, the definition of 'branch' in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in Walker Bank, supra: [385 U.S. 252]
>
> * * * * * * *
>
> "Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term 'branch'; by use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; *it may include more*. * * *" (396 U.S. l.c. 134, 135, emphasis added)

The opinion also states in part:

> "Because the *purpose of the statute is to maintain competitive equality*, it is relevant in construing 'branch' to *consider*, not merely the contractual rights and liabilities created by the transaction, but *all those aspects of the transaction that might give the bank an advantage in its competition for customers*. * * *" (396 U.S. l.c. 136, 137, emphasis added)

It is clear from this opinion that this Court did not regard the definition of "branch" to be limited to the receipt of deposits, payment of checks or the loan of money as those words appear in the definition section of 12 U.S.C. § 36(f). Nor did this Court regard that definition as "exclusive". Further, it is significant that this Court commented that the rejected two services offered by the plaintiff bank were "for the convenience of customers" (l.c. 125) and although the technical arrangements between the branch and its main facility may have strictly legal consequences "it does not follow that private contractual arrangements, binding on the parties under state law, determine the meaning of the language or the reach of § 36(f)" (l.c. 136). This Court held it was relevant to consider "all those aspects of the transaction that might give the bank an advantage in its *competition for customers*." (l.c. 136, emphasis added).

In his analysis of § 36(f) at the time of its enactment Representative McFadden explained the terms "branch" as including:

> "Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office, is a branch*."

Dickinson, supra, l.c. 134, footnote 8 quoting 68 Cong. Rec. 5816 (1927) (emphasis added).

Whereas it is the definition of "branch" in federal law which is controlling, that definition cannot be restricted to the three money functions listed in Section 36(f). The legislative history of the McFadden Act is recently set out in the scholarly opinion of Judge Wilkey in *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), cert. denied 45 U.S.L.W. 3253. With reference to the McFadden Act amendment and the definitional section of 36(f) the opinion states, l.c. 932:

> "Clearly, Congress intended to include within its definition not only the typical brick-and-mortar branch bank, but also lesser bank agencies which provide only some of the services available at a traditional branch, i.e., agencies which accept deposits, cash checks, lend money, or transact any business generally carried on at the main office."

Accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services, such as, in this case, trust services. *Driscoll v. Northwestern Nat'l Bank*, 484 F.2d 173 (8th Cir. 1973), *North Davis Bank v. First National Bank*, 457 F.2d 820, 824 (10th Cir. 1972), *State of Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976).

It is clear that a state bank in Missouri would be prohibited from operating more than one place of business for the exercise of fiduciary powers. Section 362.105 subd. 1(1) and 362.107 subd. 2(5) R.S.Mo. 1969; *St. Louis Union Trust Co. v. Pemberton*, 494 S.W.2d 408 (Mo. App. 1973).

Petitioner seeks to find a conflict of decisions by citing the District Court opinion in *Continental Illinois National Bank and Trust Co. N.A. v. Lignoul* (N.D. Ill. No. 76 C 2209, filed November 9, 1976) (Petition pp. 13-14, 21). No appeal was taken in that case. A difference of opinion between a Court of Appeals and a District Court generally is not of the character of reasons which compel this Court to grant certiorari. U.S. Sup. Ct. Rule 19(1)(b). In any event, that decision is clearly distinguishable on its facts. In the first place the Continental Illinois National Bank and Trust Co. did not establish a branch in another city—it acquired property and moved its entire trust business to a facility on the same street with its main banking offices. Further, if national banks were permitted to establish off-premises trust branches in Illinois, state trust companies

would also be permitted to do so under the Illinois Banking Act, and therefore Illinois chartered commercial banks would not be placed at a competitive disadvantage to national banks in Illinois (Slip. Opin. pp. 2, 9-10). This is not the law in Missouri.

Here, the Court of Appeals was "confronted by a systematic attempt to secure for national banks" (*Dickinson*, supra, l.c. 138) branching privileges for their trust departments, which Missouri denies to competing state banks. The profitable operation of its trust department is an essential and integral part of the functioning of Mercantile Trust Company as a national *Bank*—it is part of the reality of transacting banking business. The *Dickinson* decision, upon which Mercantile places such great reliance, squarely holds that this Court will penetrate the technical form of the transaction to reach its underlying substance in order to preserve competitive equality (l.c. 137). The Court of Appeals refused to exclude the exercise of fiduciary powers and the performance of such trust services from the definition section of the McFadden Act as contrary to all reason because it would mean that a national bank performing fiduciary functions is no longer subject to the reasonable and non-discriminatory provisions of state laws regulating the exercise of such powers as to state banks and trust companies. The "harmony and concordant exercise of national and state power" would no longer exist. *First National Bank v. Fellows ex rel. Union Trust Company*, 244 U.S. 416, 427 (1917).

There is nothing in the *Dickinson* decision to support the contention that this Court would give so restrictive a meaning to the definition to hold that a branch trust office is not a branch under Section 36(c) and (f) or that this Court would deviate from its holding in that case that local state policy "is not open to judicial review any more than is the congressional policy of 'competitive equality'. Nor is the congressional policy

of competitive equality with its deference to state standards open to modification by the Comptroller of the Currency." (l.c. 138).

II

The Court of Appeals in Holding That Mercantile Trust Company's Exercise of Fiduciary Powers at a Branch Office Contravened State Law and Violated Section 92a of the National Bank Act Correctly Applied the Law as Announced by This Court and the Courts of Appeals.

Section 92a of the National Bank Act was first enacted in 1913 as paragraph 11(k) of the Federal Reserve Act, 12 U.S.C. § 248(k). It has long been held that the Congressional policy of competitive equality was incorporated into section 92a with reference to the exercise of fiduciary powers by national banks. *First National Bank v. Fellows ex rel. Union Trust Company*, 244 U.S. 416 (1917); *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U.S. 17 (1924); *Blaney v. Florida National Bank*, 357 F.2d 27, 30 (5th Cir. 1966); *American Trust Co. v. South Carolina State Board of Bank Control*, 381 F.Supp. 313, 323 (D.S.C. 1974); *New Hampshire Bankers Ass'n v. Nelson*, 336 F.Supp. 1330, 1334 (D.N.H. 1972), aff'd 460 F.2d 307 (1st Cir.), cert. denied 409 U.S. 1001 (1972).

The location of the exercise of fiduciary powers is an essential factor inherent in applying the standard of competitive equality with respect to such powers as well as customary banking powers referred to in 12 U.S.C. §36(c) and (f). Clearly it was not the intention of Congress that the right to exercise fiduciary powers "when not in contravention of state or local law" be granted in a vacuum unrelated to and independent of location. The state law of Missouri, as found in section 362.105 subd. 1(1) and section 362.107 subd. 2(5) R.S.

Mo. 1969 and *St. Louis Union Trust Co. v. Pemberton*, supra, is clear that a state bank in Missouri is prohibited from operating more than one *place of business* for the exercise of fiduciary powers. State law has been used by Congress in the National Bank Act to provide certain guidelines to implement its legislative policy, and the mechanism of referring to state law is designed to build into the federal statute a self-executing provision to accommodate to state regulation. *First National Bank v. Dickinson*, supra, l.c. 131, 133; *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

The Court of Appeals decided that the State of Missouri's power to nondiscriminatorily limit the location where fiduciary powers may be exercised is implicit in the state's power to proscribe national banks from exercising such fiduciary powers when in contravention of state or local law. This decision does not raise a special and important question not heretofore determined. On the contrary that decision is in accord with Federal law and the decisions of this Court and other Federal courts.

> "If a state has historically chosen not to allow branch banking because of a general fear of 'bigness' and large concentration of power, there is every evidence that Congress and the Supreme Court regard this decision as the state's prerogative. * * * This frustration of state policy was not the intent of Congress in the National Bank Act nor the intent of the Supreme Court in *Walker Bank* and *Plant City* [First National Bank v. Dickinson]. Properly construed the National Bank Act and the policy of competitive equality leave to the states the question of branching and its inherent advantages and disadvantages."

Independent Bankers Ass'n of America v. Smith, 534 F.2d 921, 936 (D.C. Cir. 1976), cert. denied 45 U.S.L.W. 3253. The decision below again holds that a state is entitled to have its laws respected in such great policy matters as this.

III

The Decision of the Court of Appeals Is Limited to Facts Before That Court Concerning the Exercise of Fiduciary Powers at a Place Separate and Apart From the Main Banking House of Mercantile Trust Company.

Petitioner asserts that the decision of the Court of Appeals extends beyond the operation of a trust office by a national bank and will have an impact on the conduct of other off-premises banking facilities and activities, such as loan production offices, new business solicitation, loan closings, leasing, mortgage banking, data processing, investment advice, credit card services and various bank correspondent services (Petition, pp. 22-23).

Whether or not such banking activities are prohibited by the National Bank Act, 12 U.S.C. §§36(c), 36(f) and 92a and the law of Missouri, was not before the Court below nor decided by its opinion. The decision below was directed to the sole question whether a national bank could establish a branch trust office in another city apart from the city in which its main banking house was located for the transaction of trust business, which was part of its general banking business. *First National Bank v. Fellows ex rel. Union Trust Company*, 244 U.S. 416 (1917); *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U.S. 17 (1924).

There is no fixed test for determining what constitutes a branch bank. Each case must be considered on its own facts. *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820, 824 (10th Cir. 1972). The Court below reviewed the record before it. See opinion reported at 548 F.2d 716, 719, Petition Appendix B, p. A-20. The basis of the Court's decision is stated as follows:

> "Turning to the record before us we note that Mercantile's main office in St. Louis conducts a substantial amount of trust business. The activities performed by Mercantile at its Clayton office are summarized as follows: * * * It is apparent that *these enumerated qctivities* are also carried on routinely at Mercantile's main office. * * * *In the light of these factors*, we hold that the establishment of such a permanent place of business as undertaken by Mercantile is a branch as contemplated by Section 36(f)." (emphasis added)

Whether the off-premises activity suggested by Petitioner at pages 22-23, supra, is prohibited by the National Bank Act as suggested in *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 931 (D.C. Cir. 1976), or would be held to be only the exercise of incidental powers by a national bank, cf. *First National Bank in St. Louis v. State of Missouri ex rel. Barrett*, 263 U.S. 640, 659 (1924), or merely some extension of the main bank and not a branch, cf. *Nebraskans for Independent Banking v. Omaha National Bank*, 530 F.2d 755, 760 (8th Cir. 1976), was not before the Court of Appeals nor decided by its opinion. Petitioner's argument would require consideration of many facts totally outside of this record.

The opinion below does not reach the basic principle that there are certain activities which are incidental to the business of banking which can be performed legally apart from the main banking house, without raising the question of branching. The court found the Petitioner had established as a branch office a permanent place of business, with a permanent staff, for the purpose of obtaining new customers for its trust department and conducting trust business first as carried on at its main office in competition with state banks which were prohibited by state law from doing so. The Court of Appeals, based on these facts, held that the establishment of such a permanent place of business as established by Mercantile Trust Company was a large step across the line dividing the legal from the illegal

transaction of business and thus violated and frustrated the very purpose of the McFadden Act which is to maintain competitive equality between state and national banks.

CONCLUSION

For the reasons stated and upon the authorities cited herein this cause should not be reviewed by this Court and the petition of Mercantile Trust Company for Writ of Certiorari should be denied.

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